RE LIEW CHOO; EX P CHUAH TENG HENG

HIGH COURT MALAYA, KUALA LUMPUR
MOHD NAZLAN GHAZALI JC
[BANKRUPTCY NO: 29NCC-6822-12-2014]
3 JUNE 2016

BANKRUPTCY: *Notice – Setting aside – Dispute as to amount claimed in bankruptcy notice – Application to set aside bankruptcy notice after seven days by way of summons in chambers – Whether defective – Whether compliance with 3(2)(ii) of Bankruptcy Act 1967 mandatory – Whether defect curable by s. 131 of Bankruptcy Act*

BANKRUPTCY: *Notice – Setting aside – Dispute as to amount claimed in bankruptcy notice – Bankruptcy notice founded on single judgment and five orders on costs – Whether bankruptcy notice violated r. 91(2) and (3) of Bankruptcy Rules 1969*

The Sessions Court awarded summary judgment to the judgment creditor ('JC') in respect of his claim for debt owing from the judgment debtor ('JD'). A counterclaim filed by the JD was also struck out by the Sessions Court and costs of RM3,000 was ordered to the JC. The JC later won additional costs of RM2,000 and RM3,000 when the High Court affirmed the decisions on the summary judgment and striking out of the counterclaim by the JD respectively. The JC then secured further awards on costs when the Court of Appeal dismissed the appeals by the JD with costs of RM3,000 and RM5,000 respectively. In view of the finality of the decisions of the Sessions Court, the JC filed a bankruptcy notice ('BN') against the JD which was then served by way of substituted service. Given the failure by the JD to remedy the BN, an act of bankruptcy was deemed to have been committed by the JD and a creditor's petition was then filed. Instead of issuing a notice disputing the amount in the BN within seven days pursuant to s. 3(2)(ii) Bankruptcy Act 1967 ('the BA'), the JC commenced an application by way of summons in chambers to set aside the BN. The Senior Assistant Registrar ('SAR') allowed the JD's summons in chambers *vide* enc. 18, and set aside the BN on the grounds that the (i) failure on the part of JD to raise an objection to the amount specified in the BN within seven days of its issuance in accordance with s. 3(2)(ii) of the BA was not fatal; and (ii) BN violated r. 91(2) and (3) of the Bankruptcy Rules 1969 ('the BR') for including a judgment and five orders in a single BN. Hence, the present appeal by the JC.

Held (allowing appeal with costs):

(1) The JD must serve a notice raising a dispute that the BN cannot include the amount attributed to orders for costs in related proceedings on the JC within seven days. Adherence to the time period stated in s. 3(2)(ii) of the BA is mandatory. Non-compliance is not a mere

irregularity capable of attracting the curative provisions of s. 131 of the BA. Further, the action by the JD to set aside the BN *vide* summons in chambers in encl. 18 was erroneously made significantly out of time, if not also employing a wrong procedure at the same time, rendering it defective. The JD's failure to give notice within the stipulated time effectively meant that no such notice was lawfully made. The JD's application was thus clearly not only defective, but also constituted an incurable non-compliance of a fundamental nature, and must accordingly fail. (paras 13, 20 & 23)

(2) A bankruptcy petition cannot be founded on two separate judgments even though it may be obtained in the same suit. However, in the instant case, there was one judgment (being the summary judgment) and five orders on costs. The five orders on costs originated and concerned the same suit although there were awarded at different stages of the proceedings. Under r. 91(2) of the BR, the prohibition against a BN containing a combination of more than one final judgment or order should not apply to orders for costs which are specifically and directly awarded in reference to the final judgment because costs awards are inherently intertwined if not an integral corollary of the principal judgment itself. (paras 25, 28, 29 & 33)

Case(s) referred to:

Captain Ho Fooi v. Standard Chartered Bank Malaysia Bhd [2009] 5 CLJ 501 CA ***(refd)***

Datuk Lim Kheng Kim v. Malayan Banking Bhd [1993] 3 CLJ 324 SC ***(refd)***

Development & Commercial Bank Bhd v. Datuk Ong Kian Seng [1995] 3 CLJ 307 FC ***(refd)***

Himat Iktisas (M) Sdn Bhd v. Better Sleep Marketing (East Coast) Sdn Bhd [2001] 4 CLJ 528 HC ***(refd)***

In re a Bankruptcy Notice [1907] 14 Mans 133 ***(refd)***

In re OCS (A Debtor) [1904] 2 KB 161 ***(refd)***

J Raju M Kerpaya v. Commerce International Merchant Bankers Bhd [2000] 3 CLJ 104 CA ***(refd)***

Low Mun v. Chung Khiaw Bank Ltd [1987] 2 CLJ 400; [1987] CLJ (Rep) 172 SC ***(refd)***

MBf Cards Services Sdn Bhd v. Chew Ah Too [2009] 1 CLJ 140 CA ***(refd)***

MUI Bank Bhd v. Raju [1990] 1 LNS 132 HC ***(refd)***

Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong [1996] 3 CLJ 321 CA ***(refd)***

Re Chen Chong Fatt Willy; ex p Hitachi Lease (Singapore) Pte Ltd [1986] 1 LNS 74 HC ***(dist)***

Re Haroun Al-Rashid Mohd Yusof, Ex p Daya Leasing Sdn Bhd [1996] 2 CLJ 516 HC ***(refd)***

Re Khaw Siew Suan; Ex p Asia Commercial Finance (M) Bhd [2000] 8 CLJ 516 HC ***(refd)***

Re Khong Yuen Leng, Ex p Selberan Co Sdn Bhd [2005] 6 CLJ 538 HC ***(refd)***

Re Yeap Chee Fun, Ex p Pernas Trading Sdn Bhd [2000] 5 CLJ 280 HC ***(refd)***

Re Yii Ping Hiong & Anor Ex p: Tseng Choon Chin @ Tay Bak Hui & 5 Ors [1995] 2 BLJ 147 HC ***(refd)***

Rengasamy Pillai v. Comptroller of Income Tax [1970] 1 LNS 139 PC ***(refd)***

Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 CLJ 716 SC ***(refd)***

Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241 FC ***(refd)***
Yap Heng Cheong v. Citibank Bhd [1999] 4 CLJ 365 HC ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 3(1)(i), (2)(ii), 93(4), 131
Bankruptcy Rules 1969, rr. 18, 89(b), 91(2), (3), 95, 96, 110
Rules of Court 2012, O. 56 r. 1(3), O. 62 r. 8, O. 63A r. 9(1)
Subordinate Courts Rules 1980, O. 49

For the judgment debtor - Lucia Minta; M/s Darshan Singh & Co
For the judgment creditor - SY Ooi; M/s See Ramsun & Tan

Reported by Sandra Gabriel

JUDGMENT

Mohd Nazlan Ghazali JC:

Introduction

[1] This was an appeal by a judgment creditor ("the JC") to a judge in chambers against the decision of the learned Senior Assistant Registrar ("the SAR") dated 18 November 2015, which set aside the bankruptcy notice and the service thereof in favour of the judgment debtor ("JD").

[2] At the conclusion of the hearing of the appeal on 18 March 2016, I gave my decision to allow the appeal, stating the primary reasons for the same. This judgment contains the full reasons for my decision.

Key Background Facts

[3] On 15 January 2013, the Sessions Court in Georgetown awarded summary judgment to the JD in respect of his claim for debt owing from the JD amounting to RM41,470, with interest. The counterclaim filed by the JD was also struck out by the Sessions Court on 29 May 2013, and costs of RM3,000 was ordered against the JD.

[4] The JD's subsequent appeals against both the decisions to the High Court failed. The latter on 11 March 2013 affirmed the decision of the Sessions Court allowing summary judgment and awarded costs to the JC as the respondent of RM2,000, and on 9 January 2014 decided not to set aside the striking out of the counterclaim, and gave costs of RM3,000 to the JC.

[5] The JD's attempt to have the decisions of the High Court appealed to the Court of Appeal was not successful, given the Court of Appeal's refusal to grant leave for his notice of motion to appeal. On 23 May 2013 the Court of Appeal declined to grant leave in respect of the decision of the High Court allowing summary judgment and gave costs of RM3,000 to the JC, and on 10 April 2014 refused leave in respect of the striking out decision, and also awarded costs of RM5,000 in favour of the JC.

[6] In view of the finality of the decisions of the Sessions Court, the JC had filed the bankruptcy notice on 31 December 2014 against the JD ("the notice") which was then served by way of substituted service effective 14 days after the advertisement done on 21 April 2015. Given the failure by JD to remedy the notice, an act of bankruptcy was thus deemed to have been committed by the JD on 13 May 2015.

[7] A creditor's petition was then filed on 25 June 2015, but the JD only commenced an application by way of a summons in chambers to set aside the notice on 8 July 2015.

Essence Of The Decision Of The SAR

[8] On 18 November 2015, the SAR allowed the JD's summons in chambers in encl. 18 dated 8 July 2015, setting aside the notice, on primarily the following grounds:

(a) The failure on the part of JD to raise an objection to the amount specified in the notice within seven days of its issuance in accordance with s. 3(2)(ii) of the Bankruptcy Act 1967 ("the BA") is not fatal; and

(b) The notice violates r. 91(2) and (3) of the Bankruptcy Rules 1969 ("the BR") for including a judgment and five orders in a single bankruptcy notice.

Evaluation And Findings Of This Court

[9] The JC appealed against the decision of the SAR, challenging the grounds for setting aside the notice. The JD has also in his written submissions raised other bases to invalidate the notice in seeking to reaffirm the decision of the SAR. I shall discuss each of the issues put forward by parties, where relevant to the context set out their respective arguments, evaluate them and state my findings. In so doing, I am mindful of authorities which have established that this appeal is to be heard by way of actual rehearing and this court is to consider the application to set aside the notice afresh and decide as if it were doing so at first instance (see the Federal Court's decision in *Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241; [1996] 1 AMR 215 and the Supreme Court case of *Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 CLJ 716; [1994] 1 MLRA 179).

First Issue – Objection By JD To Bankruptcy Notice Made Beyond The Requisite Seven Day Period

[10] The notice was served by way of substituted service pursuant to an order dated 31 March 2015. Service was thus effected pursuant to the order and posted at the notice board of the High Court at Kuala Lumpur on 17 April 2015. It was also advertised on 21 April 2015 pursuant to the same order requiring advertisement be made in one Chinese language newspaper. It is worthy of mention that the order too extended the period for the service

of the notice issued on 31 December 2015 from the expiry on 31 March 2015 by six months to 30 September 2015. The JD was deemed to have committed an act of bankruptcy on 13 May 2015 following the JD's non-adherence to the terms of the notice, and as the order for substituted service stipulates that service shall be deemed to be sufficient 14 days after either the advertisement or posting at the notice board, whichever is the later. As the advertisement was done later on 21 April 2015, and after taking into account the 14 days after, the act of bankruptcy was deemed to have been committed on 13 May 2015, being seven days after service thereof.

[11] The JD's notice and the summons in chambers in encl. 18 to challenge the notice by the JC was however only filed on 8 July 2015, about two months after the deemed service of the notice.

[12] It is apposite that I set out the relevant provisions of s. 3 of the Bankruptcy Act 1967 ("the BA"), in particular sub-ss. (1)(i) and (2)(ii), which read as follows:

> (1) A debtor commits an Act of bankruptcy in each of the following cases:
>
> ...
>
> (i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in Malaysia, or by leave of the court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order with interest quantified up to the date of issue of the bankruptcy notice, or to secure or compound for it to the satisfaction of the creditor or the court; and he does not within seven days after service of the notice in case the service is effected in Malaysia, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counter-claim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained:
>
> Provided that for the purposes of this paragraph and of section 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order;
>
> ...

A (2) A bankruptcy notice under this Act shall be in the prescribed form and shall state the consequences of non-compliance therewith and shall be served in the prescribed manner:

Provided that a bankruptcy notice-

...

B (ii) *shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake;* but if the debtor does not give such notice he shall be deemed to have
C complied with the bankruptcy notice, if within the time allowed he takes such steps as would have constituted compliance with the notice had the actual amount due been correctly specified therein. (emphasis added).

[13] This statutory provision in s. 3(2)(ii) of the BA makes it plain that in
D seeking to challenge the amount due (effectively claiming the amount specified in the notice exceeds the amount actually due), which is what the JD is really pursuing in his summons in chambers (for the JD is contending that the notice cannot include the amount attributed to orders for costs in related proceedings), the JD must serve a notice raising a dispute to such
E effect on the JC within the time of compliance as stated in the notice, which is seven days.

[14] It is indisputable that in the instant case, no such notice had been served by the JD on the JC, which ought to have been done within seven days of the service of the notice of 6 May 2015. The JD chose instead to file
F the summons in chambers more than two months later on 8 July 2015. The learned SAR however concluded that this non-compliance was not fatal and allowed the setting aside of the notice. The JC argued that this is a wrong finding in law.

[15] I should start by referring to the Court of Appeal's decision in *J Raju*
G *M Kerpaya v. Commerce International Merchant Bankers Bhd* [2000] 3 CLJ 104 which reiterates the point no less clearly in the judgment delivered by Gopal Sri Ram JCA (as he then was), the relevant parts of which are as follows:

1. When determining an issue under the Act, it is incumbent upon the court to accord its provisions a strict construction.

H 2. The consequence of such an approach to construction is that a bankruptcy notice that requires a debtor to pay a judgment debt otherwise than in accordance with the terms of the judgment founded is null and void *ab initio*. Hence, a debtor does not commit an act of bankruptcy if he makes default upon such a notice.

I 3. A challenge on the ground that a bankruptcy notice requires a debtor to pay a judgment debt otherwise than in accordance with the terms of the judgment may be taken at any time after service of the notice.

4. A debtor who seeks to set aside a bankruptcy notice on the ground that it requires him to pay a judgment debt otherwise than in accordance with the terms of the judgment, must make an application in that behalf in accordance with r. 18 of the Rules.

5. A debtor who seeks to challenge the validity of a bankruptcy notice is also entitled to proceed under r. 95 of the Rules. However, if he does so, he must show that he has a counterclaim, set off or cross demand which equals or exceeds the amount of the judgment debt which he could not set up in the action in which the judgment was obtained. Further, he must act within the time limit prescribed by s. 3(1)(i) of the Act.

6. *A debtor who seeks to challenge a bankruptcy notice on the ground that the amount specified therein exceeds the amount actually due, must act in accordance with proviso (ii) to s. 3(2) of the Act. Hence, he must, within the time prescribed in the bankruptcy notice give notice in writing to the creditor that he disputes the validity of the notice on the ground that it mistakenly claims an amount larger than that lawfully due.*

7. A debtor who opposes a creditor's petition must comply with the procedure prescribed by r. 117 of the Rules. If he does not do so, any challenge he may mount is liable to fail for non-compliance of the Rules. (emphasis added)

[16] The judgment of Abdul Hamid Mohamad J (as he then was) in *Re Khaw Siew Suan; ex p Asia Commercial Finance (M) Bhd* [2000] 8 CLJ 516; [2001] 1 MLJ 101 also provides a clear summary of *J Raju a/l M Kerpaya* as follows:

Sedang saya menulis alasan penghakiman ini, penghakiman Mahkamah Rayuan dalam kes *J Raju a/l M Kerpaya v. Commerce International Merchant Bankers Bhd* dilaporkan dalam [2000] 3 MLJ 117.

Penghakiman ini menjelaskan cara membantah sesuatu notis kebankrapan:

(a) Seseorang penghutang yang berhak membantah mengenai keesahan suatu notis kebankrapan atas alasan bahawa dia mempunyai tuntutan balas, tolakan atau kena bayar balas yang jumlahnya sama banyak atau melebihi hutang penghakiman yang tidak boleh dibangkitkan dalam tindakan yang membawa kepada penghakiman itu, boleh melakukannya dengan memfail afidavit (Borang 7) mengikut k. 95 dalam tempoh tujuh hari yang ditetapkan.

(b) Seseorang penghutang yang hendak mencabar notis kebankrapan atas alasan bahawa jumlah hutang yang disebut dalam notis kebankrapan melebihi jumlah hutang sebenar hendaklah melakukannya dengan memberi notis kepada pemiutang penghakiman dalam tempoh tujuh hari yang ditetapkan itu - proviso (ii) s. 3(2) Akta Kebankrapan 1967.

A (c) Seseorang penghutang yang hendak mencabar notis kebankrapan atas alasan-alasan lain termasuk alasan bahawa notis kebankrapan itu tidak mengikuti terma-terma penghakiman, boleh melakukannya dengan memfail saman dalam kamar di bawah k 18. Had masa tujuh hari itu tidak terpakai dalam permohonan ini. (emphasis added)

B **[17]** His Lordship also held the following which is most instructive and relevant:

(3) *Bantahan terhadap notis hendaklah dibuat di peringkat notis, bukan di peringkat petisyen. Sebab jika notis itu tidak sah, perbuatan kebankrapan tidak berlaku dan petisyen pun tidak sah difailkan.* Dan, petisyen tidak sepatutnya
C difail selagi bantahan mengenai keesahan notis kebankrapan belum diputuskan. Dalam keadaan undang-undang yang ada sekarang, setelah memberi notis kepada pemiutang penghakiman dalam tempoh tujuh hari, penghutang penghakiman hendaklah memfail saman dalam kamar di bawah k. 18 untuk diputuskan oleh mahkamah. Afidavit di bawah k. 95 (Borang 7) tidak boleh dipakai kerana ia cuma terhad kepada tuntutan
D balas, tolakan dan kena bayar balas (lihat ms 111D-F).

(4) *Dalam kes ini, notis di bawah s. 3(2) proviso (ii) Akta Kebankrapan 1967 tidak diberi dan bantahan ini tidak dibuat (selepas memberi notis itu dalam tempoh tujuh hari yang ditetapkan itu) melalui saman dalam kamar di bawah k. 18. Maka hujah mengenai jumlah hutang yang berlebihan itu sepatutnya ditolak atas alasan itu sahaja* (lihat ms 112C) ... (emphasis added).
E

[18] Further, in the Court of Appeal case of *Captain Ho Fooi v. Standard Chartered Bank Malaysia Bhd* [2009] 5 CLJ 501, Sulaiman Daud JCA, delivering the judgment of the court, held as follows:

Any challenge to the validity of a BN on the ground that the amount
F stated therein exceeds the amount actually due must be made within the time prescribed in the said notice as required by proviso (ii) to s. 3(2) of the Bankruptcy Act 1967 ('the Act'). The BN was personally served on the JD and the JD gave no notice to the JC that he disputed the validity thereof by reason of excess amount within the stipulated seven-day period. The JD would have committed an act of bankruptcy after the
G expiry of seven days from the date of service by virtue of s. 3(1)(i) of the Act. Based on the authorities, the appeal on the calculation of late charge must therefore fail.

[19] This position on the effects of non-compliance with s. 3(2)(ii) is thus well settled, for in an earlier Federal Court's decision in *Development &*
H *Commercial Bank Berhad v. Datuk Ong Kian Seng* [1995] 3 CLJ 307, the Federal Court also relied on the same ground as one of the reasons to dismiss the appeal against the setting aside of the relevant bankruptcy notice. Mohamed Dzaiddin Mohamed FCJ (as he then was), delivering the judgment of the court, made the following pertinent remarks on the point:

I Moreover, what is patently clear to us is that on the facts, the respondent cannot be allowed to dispute the validity of the bankruptcy notice on the ground on which he now relies because the notice of dispute by way of his affidavit affirmed on 18 February 1992 has not complied with proviso

(ii) to s. 3(2) of the Act, *it having been served on the appellant about seven months after the service of the bankruptcy notice on him (the respondent). The bankruptcy notice cannot therefore be challenged as to the interest specified therein.* (emphasis added)

[20] The preponderance of case law authorities on the point is thus unmistakably well established. Adherence to the time period stated in s. 3(2)(ii) of the BA is mandatory. Non-compliance is not a mere irregularity capable of attracting the curative provisions of s. 131 of the BA for it is established law that not all forms of irregularities will justify the setting aside of a bankruptcy notice. Section 131 provides thus:

No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of the court.

[21] The essence of the kind of defects envisaged to be curable by this provision could be found in the following passage in the opinion of Lord Diplock, in delivering the decision of the Privy Council in *Rengasamy Pillai v. Comptroller of Income Tax* [1970] 1 LNS 139; [1970] 1 MLJ 233:

What then is a 'formal defect or irregularity' within the meaning of the section? This was discussed in relation to a bankruptcy notice in *Re A Debtor ex p The Debtor v. Bowmaker Ltd.* [1951] 1 Ch 313 in which the earlier authorities were considered. The test there laid down was whether the defect in the notice was of such a kind as could reasonably mislead a debtor upon whom it was served. If it was, the notice was not validated by the section notwithstanding that the particular debtor upon whom it was served was not in fact misled. If on the other hand it could not reasonably mislead the debtor it was a formal defect and validated by the section.

[22] Clearly, s. 131 is designed more to cure defects that would not mislead or prejudice a debtor. In the instant case, the non-compliance and defect was occasioned by the JD himself. In this context, it would be a tautology to speak of the JD being misled by his own mistake. The other irregularity committed by the JD was to have pursued the setting aside by filing a summons in chambers under r. 18 when the correct procedure should have been by filing an affidavit as an application to set aside under r. 95 (see *J Raju M Kerpaya* above).

[23] Accordingly, in my assessment, in view of the foregoing, it is palpably inescapable a conclusion that the action by the JD to set aside the notice *vide* his summons in chambers in encl. 18 was so erroneously made significantly out of time, if not also employing a wrong procedure at the same time, rendering it defective. His failure to give notice within the stipulated time effectively meant that no such notice was lawfully made. This application is thus clearly not only defective, but also constitutes an incurable non-compliance of a fundamental nature, and must accordingly fail.

Second Issue – The Bankruptcy Notice Combines More Than Two Judgments

[24] The learned SAR agreed with the contention of the JD that the notice is bad for violating r. 91(2) of the Bankruptcy Rules 1969 ("the BR") for including a judgment and five orders in a single bankruptcy notice. Rule 91(2) states as follows:

> (2) A creditor is not entitled to apply for the issue of as bankruptcy notice by combining two or more final judgments or final orders.

[25] The JD relies principally on the case of *Re Chen Chong Fatt Willy, ex p Hitachi Lease (Singapore) Pte Ltd* [1986] 1 LNS 74; [1987] 1 MLJ 94 which is an authority for the rule that is well accepted that a bankruptcy petition cannot be founded on two separate judgments even though it may be obtained in the same suit. The Singapore High Court held that the authority for this rule was found in *In re a Bankruptcy Notice* [1907] 14 Mans 133; 96 LT 133 and also referred to the case of *In re OCS (A Debtor)* [1904] 2 KB 161, and reproduced the headnote which reads:

> A receiving order was made against a debtor, the act of bankruptcy being non-compliance with the Bankruptcy Notice. On appeal from the order it was objected that the bankruptcy notice was bad because it was founded on two judgments debts (as was decided by the Court of Appeal *In re Low* [1900] 1 QB 147) and that consequently there was no act of bankruptcy. Held, that the objection was fatal to the receiving order, and, in accordance with *In re Collier* (1891) 8 Mort 80 83 that leave to amend the bankruptcy notice ought not to be given.

[26] But as in most things requiring critical evaluation, it is imperative that the details of the judgments and orders be properly understood. In *Re Chen Chong Fatt Willy*, the court said this:

> In this particular case I held that there were two judgments although they were in the same suit, **one a consent judgment dated June 24, 1985 for $2,000/- and the other a contested judgment dated July 8, 1985 for $24,676.78.** Execution on these two judgments would have to be levied separately (see Order 45 rule 1(a) and Order 46 rule 4 R.S.C.). (emphasis added)

[27] A quick research reveals that there is a Malaysian High Court decision which follows *Re Chen Chong Fatt Willy*. In *Re Yii Ping Hiong & Anor ex parte: Tseng Choon Chin @ Tay Bak Hui & 5 Ors* [1995] 2 BLJ 147, the bankruptcy notice had required the debtors to pay the creditors the sum of RM21,417 being the total amount due on two judgments obtained by them against the debtors in the High Court at Sibu, dated 12 June 1992 and 14 October 1992 respectively in Suit No. 23 of 1991. More specifically, the court said this on the nature of the judgments in question:

> In this suit, the creditors had obtained final judgments under O. 18 r. 19 against the debtors for the sum of RM21,417 being the amount claimed as mesne profits at RM300 per month from July 1990 to June 1993 and

taxed costs. *The two judgments were obtained on 12 June 1992 and 14 October 1992 respectively. They were two separate and distinct judgments in one suit.* It is clear that there were two judgments and both were final judgments. I hold that there were two final judgments, upon which this petition was founded. The bankruptcy notice is clearly in contravention of r. 91(2) and therefore is bad, null and void.

[28] In these two decisions, it is clear that there are in both cases two distinct and separate judgments which arise from the same suit. In the instant case, there is one judgment (being the summary judgment) and five orders on costs. For better appreciation, I reproduce below the relevant parts of the notice on this point:

AMBIL PERHATIAN bahawa dalam tempoh tujuh (7) hari selepas penyampaian notis ini ke atas kamu tidak termasuk hari penyampaian tersebut, kamu mestilah membayar kepada Chuah Teng Heng yang beralamat di No. 1M, Jalan Beriksa 3, 11500, Bandar Baru, Air Itam, Pulau Pinang wang sejumlah RM62,619.10 yang dituntut olehnya sebagai amaun yang kena dibayar atas penghakiman muktamad bertarikh 15/1/2013 yang diperolehi olehnya terhadap kamu dalam Mahkamah Sesyen di Georgetown, melalui Guaman No. 52-964-05/2012 yang pelaksanaan atasnya telah tidak digantung dan perintah-perintah mengenai kos terhadap kamu dalam Mahkamah berikut:

(a) Mahkamah Tinggi di Pulau Pinang melalui Rayuan Sivil No. 12A-12-01/2013;

(b) Mahkamah Rayuan Malaysia di Putrajaya melalui Permohonan Sivil No. P-08-247-04/2013;

(c) Mahkamah Tinggi di Pulau Pinang melalui Rayuan Sivil No. 12A-48-06/2013;

(d) Mahkamah Rayuan Malaysia di Putrajaya melalui Permohonan Sivil No. P-08-44-02/2014 …

Butir-butir amaun yang dituntut:

Amaun yang diputuskan dalam Mahkamah Sesyen di Georgetown pada 15/1/2013 melalui Guaman No. 52-964-05/2012.	RM41,470.00
Tambah: Faedah atas RM41,470.00 pada kadar 4% setahun dari 25/11/2011 sehingga 31/12/2014 (1133 hari)	RM 5,149.10
Kos	RM16,000.00
Jumlah terhutang setakat 31/12/2014	RM62,619.10 =========

[29] The five orders on costs originate and concern the same suit although there were awarded at different stages of the proceedings. As stated in the notice under the column on particulars of the amount claimed, the sum for costs is RM16,000. As referred to in the earlier part of this judgment, this

aggregate sum is derived from five separate orders arising from proceedings originating from one specific judgment. This judgment is the summary judgment granted to the JC at the Sessions Court accompanied by the striking out with costs of RM3,000. The JC later won additional costs of RM2,000 and RM3,000 when the High Court affirmed the decisions on the summary judgment and striking out of the counterclaim by the JD respectively. The JC then secured further awards on costs when the Court of Appeal dismissed the appeals by the JD with costs of RM3,000 and RM5,000, respectively. Hence, the total claim sum for costs in respect of the decision and appeals concerning the summary judgment being RM16,000. Thus, unlike cases such as *Re Chen Chong Fatt Willy* and *Re Yii Ping Hiong* which clearly involve two separate judgments *albeit* emanating from the same suit, in the instant case there is for all intents and purposes only one judgment and five orders on costs which relate directly to the said one judgment.

[30] In this connection, reference to the case of *Re Haroun Al-Rashid bin Mohd Yusof, ex parte Daya Leasing Sdn Bhd* [1996] 2 CLJ 516; [1996] 5 MLJ 317 is instructive. In that case, the judgment creditor had claimed the judgment sum pursuant to a judgment dated 28 June 1988 wherein costs were also ordered against the judgment debtor. The costs were subsequently taxed and assessed at RM4,261.26 by the Magistrate on 27 July 1998. It was argued by the debtor that the bankruptcy notice claiming the judgment sum together with interest and costs was defective as it was based on two judgments, namely the main judgment and the said second "judgment" for costs. The High Court however most significantly stated the following:

> *It is apparent from the terms of the above mentioned judgment, order and notice, that there is only one final judgment dated 28 June 1988. The order dated 27 July 1988 is in respect of costs which is a decree of the court itself on 28 June 1988 ordering costs to be paid* and the order dated 27 July 1988 merely orders the JC to pay this decreed costs together with interest thereon calculated at the rate 8% per annum from 27 July 1988 to the days of realisation. Therefore it is clear in the case of costs the effective judgment is the decree of the court on 28 June 1988 itself, not the order dated 27 July 1988 quantifying the amount. (emphasis added)

[31] I should state that the High Court in that case had in fact set aside the bankruptcy notice on other grounds but the more important point for present purposes is that it has been made manifest that the order quantifying the costs was part and parcel of the main judgment and that the issue of there being separate judgments in situations involving order for costs does not arise.

[32] A similar finding was made in another High Court decision, one that was not submitted by counsel for parties in this appeal. In *Re Khong Yuen Leng, ex p Selberan Co Sdn Bhd* [2005] 6 CLJ 538, the judgment creditor had succeeded in obtaining judgment for a sum of S$43,688.30 against the judgment debtor in the High Court of Singapore on 2 February 1998. The creditor then registered the said judgment in the High Court of Malaya under

the Reciprocal Enforcement of Judgments Act 1958 ('REJA'). Subsequently, the Assistant Registrar of the High Court of Singapore proceeded to tax the costs in pursuance of the terms of the judgment and accordingly issued two certificates: the first was for the sum of S$111,947.56 as costs due and payable by the creditor to the second defendant in the suit, which pursuant to the judgment was recoverable by the creditor from the debtor and the second was for the sum of S$240,640 which was the costs due and payable by the debtor to the creditor. The creditor then took out a bankruptcy notice based on the judgment dated 2 February 1998 and both the said Registrar's certificates ('the certificates') which was subsequently set aside by an SAR. One of the issues on appeal was whether there were three separate orders lumped in one bankruptcy notice in breach of the Bankruptcy Rules. Ramly Ali J (as His Lordship then was) held as follows:

> [1] The two certificates issued by the assistant registrar of the Singapore High Court expressly stated that they were made pursuant to the judgment dated 2 February 1998. The said certificates had made no order for the payment of costs. It merely assessed and quantified the amount to be paid as ordered pursuant to the said judgment. *There was only one final judgment for both the judgment sum and for costs and the assistant registrar's certificates were to be read together and in conjunction with the final said judgment dated 2 February 1998. The bankruptcy notice was based only on one final judgment and not on three separate orders as the JD contended.* (emphasis added)

[33] It is worthy of emphasis that *Re Chen Chong Fatt Willy* was referred to in both *Re Haroun Al-Rashid bin Mohd Yusof* and *Re Khong Yuen Leng*. It is therefore my view that the position in law ought to be deemed well settled in that under r. 91(2) the prohibition against a bankruptcy notice containing a combination of more than one final judgment or order should not apply to orders for costs secured by the creditor which are specifically and directly awarded in reference to the final judgment in question because costs awards are inherently intertwined if not an integral corollary of the principal judgment itself. This should be the case even if the costs are granted at appeal proceedings, for as long as they relate to the same original final judgment. Separating them into different final judgments or orders, attracting the proscription that is r. 91(2), serves no discernible purpose or benefits to relevant stakeholders, especially since it poses no prejudice to the judgment debtors and does not contribute much to promote greater efficiency in the machinery and administration of bankruptcy laws in the country.

Other Issues – (a) Appeal Filed Out Of Time

[34] For completeness, even though I have addressed the principal grounds of appeal put forward by the appellant JC, I will also now briefly deal with issues raised in written submissions by the JD in his challenge of the validity of the notice. These were not actually raised at the hearing of the appeal, nor based on the notes of proceedings, in the hearing before the learned SAR.

[35] The first issue is whether the appeal herein was filed by the JC out of time. That is the contention of the JD. It is not in dispute that the matter is governed by O. 56 r. 1 of the Rules of Court 2012, the relevant parts of which provide as follows:

> 1. Appeals from certain decisions of Registrar of the High Court to a Judge in Chambers (O. 56 r. 1)
>
> (1) An appeal shall lie to a Judge in Chambers from any judgment, order or decision of the Registrar of the High Court.
>
> (2) The appeal shall be brought by serving on every other party to the proceedings in which the judgment, order or decision was given or made a notice in Form 114 to attend before the Judge on a day specified in the notice.
>
> (3) Unless the Court otherwise orders, *the notice shall be filed within fourteen days after the judgment, order or decision appealed against was given or made, and shall be served not less than five days before the date fixed for the hearing of the appeal.* … (emphasis added)

[36] As the decision of the SAR was given on 18 November 2015, the JD contends that the last date of filing and serving a copy of the sealed notice of appeal is 2 December 2015 before 4pm. The JC served only an unsealed notice of appeal on 2 December 2015 *vide* the JC's solicitors' letter dated 1 December 2015 at 5.15pm, beyond the stipulated time, and that a copy of the notice showed that it was filed on 2 December 2015 at 6.40pm and that a copy of a sealed notice was served under cover of the letter of the JC's solicitors dated 7 December 2015 on 10 December 2015.

[37] I find the contention of the JD to be lacking in merits. It should be noted that there is a clear distinction in this context between filing at the Court Registry and serving on the JD. Order 56 r. 1(3) refers to filing of the notice within 14 days after decision. The JC did file the notice on the last day of the 14 day period on 2 December 2015. There is no provision requiring the filing be made by 4pm to avoid it be deemed to be filed the day after if done after 4pm. The JD refers to O. 62 r. 8 of the RC 2012 which concerns the effect of service after certain hours which does contain a cut off time of 4pm but that is only applicable to service of documents, not in respect of their filing at Court Registry. As the JC did file within the 14 day period after the decision, no objection could be made to the filing of the same. The fact that it was filed late on the very last date does not in my view pose any substantive or undue prejudice to the JD, for as long as the mandatory requirement on service on the JD as stated in O. 56 r. 1(3) is strictly adhered to. The filing done at 6.40pm was not procedurally improper, despite it being outside business and office hours, because O. 63A r. 9(1) of the RC 2012 clearly states that a document filed using the electronic filing service shall be deemed to be filed upon successful payment of the prescribed fees, which in the instant case occurred at 6.40pm on 2 December 2015, in compliance with O. 56 r. 1(3).

[38] In any event, as I have stated, the requirement on service is mandatory and must be complied with (see the Court of Appeal's decision in *Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong* [1996] 3 CLJ 321; [1996] 3 MLJ 85). In this respect, it is observed that the JC had clearly adhered to the same, for the unsealed and sealed copy of the notice of appeal were served on the JD on 2 December 2015 and 10 December 2015, respectively, both of which are dates very substantially more than five days before the date fixed for the hearing of the appeal which was in March 2016.

[39] The JD also referred to a number of cases to support his one other argument that service on the JD of a notice which was not properly endorsed renders the same defective. I do not think that this is a valid contention. Firstly, the service of the sealed copy on 10 December 2015 is good service as it was way beyond the minimum five day period prior to the appeal hearing. Secondly, the cases such as *MBf Cards Services Sdn Bhd v. Chew Ah Too* [2009] 1 CLJ 140; [2008] 6 AMR 361 and *Himat Iktisas (M) Sdn Bhd v. Better Sleep Marketing (East Coast) Sdn Bhd* [2001] 4 CLJ 528; [2002] 1 MLJ 577 cited by the JD both concern interpretation of O. 49 of the former Subordinate Courts Rules 1980 which provisions are not in *pari materia* with those in the prevailing O. 56 r. 1.

[40] Nor is the JD's contention, made briefly in his written submission on the failure of the JC to serve the order of the learned SAR being appealed against with the appeal notice to be meritorious. Under O. 56 r. 1, the notice as per the prescribed Form 114 must comply with two mandatory requirements. First, the JC must state in full the order appealed against and secondly, state the order sought to be obtained. There is no requirement on the need to attach a copy of the order being appealed against. Thus, the JD's assertion on the appeal being filed out of time is devoid of merit and must fail. Based on the relevant dates, even if one were to argue that the provisions in r. 89 of the BR concerning appeals should apply instead of O. 56 of the RC 2012, the appeal would similarly be competent as it was both entered as well as served within 14 days from the date of the order in pursuance of r. 89(b) of the BR.

(b) Miscalculation Of Interest

[41] The JD alleges a number of defects pertaining to the claims on interest in the notice. These include the calculation not excluding the date of the judgment and the date of the filing of the notice, the exact amount of interest for each of the judgment and orders (themselves not separately identified) is unspecified. I find this assertion to be short on substance. It is plain and obvious from the notice that the costs do not carry interests and in any event, I do not consider the notice defective since it has clearly as shown above specified the amounts attributed to the judgment sum, interests thereon for 1133 days, and costs, which collectively make up the outstanding sum of RM62,619.10 as at 31 December 2014.

[42] It should, on the other hand, be observed that despite challenging the computation of interests and the outstanding sum specified in the notice, the JD did not however state in what manner it was wrongly quantified and equally importantly what amount ought to be the accurate calculation based on his computation which was also not presented in either the affidavits or even in the written submission. The law on the setting aside of a bankruptcy notice is well settled in that in order to mount a successful challenge under s. 3(2)(ii) of the Bankruptcy Act 1967, the onus is on the debtor who must descend to details to demonstrate where the alleged error has arisen. In this regard, I shall attempt to do no better than reproducing the relevant part of the judgment of Mohamed Dzaiddin Mohamed SCJ (as he then was) in *Datuk Lim Kheng Kim v. Malayan Banking Berhad* [1993] 3 CLJ 324, which directly referred to the point in the following manner:

> We are concerned here with the content of the said affidavit. It merely denies and disputes that the appellant was indebted to the respondent in the sum of RM2,603,913.28, but fails to disclose that he has a counterclaim, set-off or cross demand etc. against the respondent, which he is required to depose under s. 3(1)(i) of the Act and provided for in Form 7. Following the above decision and in the face of the above affidavit, we are of the opinion that the said affidavit cannot operate as an application to set aside the bankruptcy notice within the contemplation of s. 3(1)(i) of the Act, and the case should have been treated as if no affidavit under r. 95 had in fact been filed. *Similarly, as para 3 of the enclosure merely disputes his indebtedness in the said sum to the respondent "based on an erroneous calculation and grossly exaggerated" without condescending to particulars of the amount actually due, we say that the said affidavit does not attract proviso 2(ii) of s. 3 which states that a bankruptcy notice shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the actual amount due.* (emphasis added).

[43] It is also the situation in the instant case that the JD has plainly similarly omitted to provide sufficient particularisation, other than making general averments about the notice being erroneous and the interest payments not clearly stated, to demonstrate what he claimed to be a wrong computation nor furnish what ought to be the accurate one, if indeed it was different from the sum stated in the notice.

(c) Writ Of Seizure And Sale By The JC Still In Force

[44] The JD also made brief mention of his objection to the JC pursuing the bankruptcy proceedings when there is already a subsisting writ of seizure and sale against the JD instituted by the JC, and that this fact was not mentioned in the request for issue of bankruptcy notice or in the notice itself. This contention is devoid of merit. The writ of seizure and sale has no relevance to the notice in the instant case. The JC has sufficiently clarified that the writ dated 16 May 2013 has been withdrawn with liberty to file afresh, for even though the JC did through court bailiffs secure the seizure

of the movable properties of the JD, plans to convene a public auction to effect the sale did not materialise following the JD's own solicitors' police report dated 23 April 2014 (and similarly notified to the court) claiming that the premises of the JD had been broken into, and the seized properties intended to be auctioned, stolen.

(d) No Evidence Of Service Of Bankruptcy Notice

[45] The JD's brief submission on the absence of evidence that there was proper service is wholly misconceived for service had been ordered to be performed by way of substituted service in pursuance of r. 110 of the BR as stated in the earlier parts of this judgment. The JD's cursory assertion that the JC did not satisfy the requirements to justify substituted service and that the substituted service too was not validly effected are in my view wholly unsubstantiated. The affidavit of the JD contains unconvincing riposte to the affidavit of non-service affirmed by an employee of the solicitors for the JC who had made attempts to effect personal service of the notice on the JD, as well as to the subsequent affidavit by the same employee on effecting substituted service. Neither is the argument that the substituted service not requiring a copy of the notice be posted on the door of the home of the JD renders the order a nullity for the court has a wide discretion in deciding a mode of substituted service (see the Supreme Court's decision of *Low Mun v. Chung Khiaw Bank Ltd* [1987] 2 CLJ 400; [1987] CLJ (Rep) 172; [1988] 1 MLJ 263). Other that the obvious lack of justifications disputing the order for substituted service, it is also of relevance that reference be made to the observation by Abdul Hamid Mohamad J (as His Lordship then was) in *Re Yeap Chee Fun, Ex p Pernas Trading Sdn Bhd* [2000] 5 CLJ 280; [2000] 5 MLJ 510 on this point as follows:

> Where an order for substituted service is made the issue is not whether the judgment debtor knows about the bankruptcy notice or not, but whether the order for substituted service is correctly made and the subsequent service is in accordance with the order or not. The judgment debtor may or may not know about it at the time when the substituted service is made. No actual knowledge need be proved. The fact that the judgment debtor is not aware of the bankruptcy notice, even if it is true, does not nullify service.

[46] Thus, an order for substituted service is incapable of being challenged on the basis of the debtor remains in the dark after service has been effected in accordance with the terms of the order. In any event in the instant case, the JD has been represented by solicitors from the time of the suit which resulted in the summary judgment of 15 January 2013, and it is difficult to accept that cause papers including in respect of bankruptcy proceedings are beyond the reach of lawyers who engage in interactions with Court Registry almost on daily basis. Thus the argument that a copy of the judgment was not served on the JD too is similarly untenable for the additional reasons that

in the first place there is no requirement that a copy is to be served with the notice and secondly as a matter of fact it was attached to the request for issue of bankruptcy notice and served together with the notice by way of substituted service.

(e) Bankruptcy Notice Cannot Be Extended For Six Months

[47] One other argument advanced by the JD in his affidavit and written submission which I shall deal with, by summarily dismissing the same is the contention that under r. 96 of the BR the notice is valid for only three months such that an extension for six months is invalid. The affidavit of the JD attempts to provide greater elucidation of this assertion by averring that any extension is only valid for a maximum period of three months. This allegation is clearly unfounded. First, it is not supported by the plain words of r. 96 which states as follows:

> 96. Duration of Notice
>
> Subject to the power of the Court to extend the time, a bankruptcy notice to be served shall be served within three months from the issue thereof.

[48] The power to extend is thus not limited by r. 96 to a particular minimum period of extension. Secondly, and this is not even mentioned by the JC, case law authorities have held that not only that an application for extension may be made before or after the expiry of the three months, the notice may also be extended for a period longer than three months. I need only refer to the case of *Yap Heng Cheong v. Citibank Bhd* [1999] 4 CLJ 365; [1999] 6 MLJ 607 where Abdull Hamid Embong J (as His Lordship then was) said this:

> The words '… upon such terms, if any, as the Court seems fit' are, seemingly, wide enough to include also the period of extension which the Court may allow in the exercise of its discretionary power thereunder. I also wholeheartedly agree with the position taken by the learned judge in *MUI Bank Bhd v. Raju* in respect of the legislature's intended silence on the time limit in r. 96 of the Rules, and would now hold that if Parliament had so intended that there be a maximum time limit for serving the BN, it would certainly had so expressed under that rule. In the absence of such an affirmative constraint, the court can turn to s. 93(4) of the Act and allow for a time extension as it seems fit.

[49] Section 93(4) refers to the discretionary power of the court to extend time as it seems fit and which fortifies the construction that an extension under r. 96 is not subject to any minimum period. This case follows an earlier case mentioned in the above passage which had considered the same rules and employed the same reasoning. Thus in *MUI Bank Bhd v. Raju* [1990] 1 LNS 132; [1991] 3 MLJ 388, Siti Norma Yaakob J (as Her Ladyship then was) decided on the point all too clearly as follows:

Kaedah 96 hanya menentukan masa notis kebankrapan hendak diserahkan kepada penghutang iaitu dalam tempoh tiga bulan dari tarikh notis berkenaan dikeluarkan. Kaedah ini tidak pula menetapkan tempoh masa notis berkenaan boleh dilanjutkan. Oleh yang demikian, bantahan penghutang bahawa notis kebankrapan tidak boleh dilanjutkan lebih daripada tiga bulan seperti dinyatakan oleh k. 96 juga tidak boleh diterima.

Conclusion

[50] In view of the foregoing reasons, it is my judgment that the JD has failed to prove his case on a balance of probabilities to have the bankruptcy notice set aside, nor in respect of the request for the issue of the notice and the order for substituted service. Accordingly the decision of the learned SAR is reversed and this appeal by the JC be allowed, with costs.